(1)

Filed

No. 03-1302

IN THE

Supreme Court of the United States

PATRICIA S. CONROY,

Petitioner,

v.

TOWNSHIP OF LOWER MERION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT TOWNSHIP OF LOWER MERION

JOSEPH J. CENTENO
OBERMAYER REBMANN MAXWELL
& HIPPEL LLP
One Penn Center
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103
(215) 665-3000

Attorneys for Respondent
Township of Lower Merion

187517

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTION PRESENTED

Petitioner Patricia Conroy missed over two months of continuous work under the Family and Medical Leave Act ("FMLA"), 26 U.S.C. § 2601, *et seq.*, because of back pain caused by moving air. The moving air emanated from an air-conditioning vent and open windows at her workplace. When Petitioner asked to return to work with workplace accommodations, the Township of Lower Merion (the "Respondent") requested a medical examination to determine what workplace accommodations were necessary to safely restore her. Respondent's request for a medical examination comported with past practice developed under the collective bargaining agreement ("CBA") between Respondent and Petitioner's union. Petitioner unreasonably refused.

The Petition raises the following question:

> Does the FMLA prohibit an employer from requiring, under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, and consistent with past practice, an employee to undergo a medical examination, at the employer's cost, to determine what accommodations, if any, are necessary to return the employee safely to a workplace that, according to the employee's physician, caused her to miss over two months of work?

TABLE OF CONTENTS

	Page
Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Statement of the Case	1
I. Clarification Of The Record.	2
A. Respondent affirmatively sought to make Petitioner more comfortable.	2
B. Workplace moving air caused Petitioner to have back pain despite accommodations.	3
II. Petitioner's Claims.	4
Reasons for Denying the Petition	5
I. Neither The Record Nor The Third Circuit's Ruling Below Raise The Questions Presented By The Petition.	5
II. The Third Circuit's Ruling Does Not Conflict With A Decision By This Court Or Any Court Of Appeals.	7

Contents

	Page
III. This Case Does Not Have Any Far Reaching Implications.	9
IV. The Third Circuit Was Correct In Affirming The District Court.	11
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

CASES

Albert v. Runyon, 6 F. Supp. 2d 57 (D. Mass. 1998) 7

Buskirk v. Apollo Metals, 307 F.3d 160 (3d Cir. 2002) 8

Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 5

Duty v. Norton-Alcoa Proppants, 293 F.3d 481 (8th Cir. 2002) 7

Mathews v. Fairview Health Servs., 2003 U.S. Dist. LEXIS 5901 (D. Minn. 2003) 7

Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002) 8

Routes v. Henderson, 58 F. Supp. 2d 959 (S.D. Ind. 1999) 7

Underhill v. Willamina Lumber Co., 1999 U.S. Dist. LEXIS 9722 (D. Or. 1999) 7

Wilson v. Lemington Home for the Aged, 159 F. Supp. 2d 186 (W.D. Pa. 2001) 8

Cited Authorities

Page

STATUTES AND REGULATIONS

26 U.S.C. § 2601 i

42 U.S.C. § 12101 i

29 C.F.R. § 825.214(b) 11

29 C.F.R. § 825.310(b) 12

29 C.F.R. § 825.702(a) 12

STATEMENT OF THE CASE

There is no conflict for the Court to resolve. The Third Circuit and Circuit Judge Edward Becker properly and unanimously affirmed the district court. This affirmance presents no conflict with any decision by either this Court or any court of appeals.

This matter also presents no far-reaching implications. The facts are unique and somewhat bizarre. This matter arises from Petitioner's puzzling refusal to accept Respondent's good faith efforts to return Petitioner safely to her workplace. Petitioner demands the "right" to be reinstated to the same workplace that caused her to miss over two months of work. As noted by Judge Becker, "[i]t is difficult to understand why Petitioner would not agree to an IME (the Respondent would have covered the cost), and it is most unfortunate that this fine, long-term, employee of the Respondent so harmed herself by refusing to agree, but her refusal is fatal to her position." (Pet. App. at 5a).

Petitioner took over two months of continuous medical leave under the FMLA. Petitioner's physician opined that workplace air currents caused Petitioner to have back pain; he restricted Petitioner from returning to work until her back pain and workplace "conditions" improved. While on leave, Petitioner requested additional accommodations — that Respondent move her workplace location and eliminate cold temperatures and drafts. In response, Respondent requested Petitioner to undergo a medical examination, at the Respondent's cost, to determine what accommodations to the workplace were necessary for Petitioner's safe return.

Petitioner sued Respondent under the ADA and FMLA. The district court granted summary judgment on all counts except the FMLA, and later granted judgment as a matter of law on the FMLA claims. The Third Circuit affirmed.

I. Clarification Of The Record.

Petitioner's facts bear little resemblance to the record and findings below.

A. Respondent affirmatively sought to make Petitioner more comfortable.

Respondent affirmatively sought to accommodate Petitioner's aversion to moving air. Years before Petitioner requested FMLA leave, Petitioner agreed to a medical examination, at Respondent's cost, to determine what accommodations were needed. Based on the physician's findings and recommendations, Respondent also retained a ventilation expert, again at Respondent's cost, to study moving air in Petitioner's workplace. The study showed that even with windows open and the air-conditioning system on, air currents dissipated before reaching Petitioner's workplace.

Nevertheless in 1988, in good faith, Respondent took additional affirmative steps, at its own cost, to make Petitioner more comfortable. Respondent informed Petitioner that her co-workers would endeavor to keep windows closed even in the absence of evidence that open windows caused moving air at Petitioner's workplace. Respondent also installed, again at its cost, an air vent above, and weather stripping under, the entrance door leading to her workplace.

B. Workplace moving air caused Petitioner to have back pain despite accommodations.

Despite the Respondent's efforts to make Petitioner more comfortable in her workplace, Petitioner left work because of back pain. Her physician concluded that moving air, flowing from both an air-conditioning vent and open windows, and "stressful working conditions," caused Petitioner to have back pain. Petitioner's physician then placed Petitioner on sick leave for over two months and proclaimed that she could not return to work until her condition and "her workplace conditions" improved. Respondent promptly approved[1] Petitioner's request for FMLA leave.

While on FMLA leave, Petitioner submitted to Respondent a medical certification that was objectively unclear and confusing. Her physician proclaimed Petitioner able to "return to unrestricted duty," but that she must avoid "cold and drafts." Because Respondent did not want to place Petitioner in the exact same workplace that caused her to miss over two months of work, it reasonably requested that she undergo a medical examination before restoration. Respondent sought to discover what accommodations were necessary to ensure Petitioner's safe return. Respondent followed this procedure with approximately 25 other employees on medical leave as part of its past practice under the CBA. The union agreed with Respondent that a medical examination was proper under the CBA.

---

1. Respondent specifically informed Petitioner that Respondent's FMLA Policy, which it provided to Petitioner, and the CBA between Petitioner's union and Respondent would govern her leave.

Because Petitioner steadfastly refused to cooperate with Respondent's requested medical examination, as was her obligation under the ADA, her seniority rights lapsed on September 9, 2000, under the CBA.

II. Petitioner's Claims.

Petitioner claimed, *inter alia*, that the Respondent violated the FMLA[2] and ADA. Petitioner alleged that Respondent failed to accommodate her in violation of the ADA. She also alleged that Respondent violated the FMLA by retaliating against her for taking leave and failing to restore her to her workplace following her FMLA leave.

The district court granted Respondent's motion for summary judgment on Petitioner's ADA claim because: (1) Petitioner was not disabled; (2) Respondent articulated a legitimate, non-discriminatory reason for not returning plaintiff to work — namely, that she would not submit to a medical examination; and (3) Petitioner could not show pretext.

The parties tried Petitioner's remaining FMLA claims to a jury, and the district court granted Respondent's motion for judgment as a matter of law at the close of Petitioner's case. The Third Circuit affirmed the district court. The Third Circuit affirmed because: (1) the FMLA does not grant a right of immediate restoration when additional accommodations are required, as with Petitioner; (2) Petitioner failed to present any evidence of FMLA retaliation; and (3) Petitioner failed

---

2. Petitioner failed to aver in any pleading that Respondent violated the FMLA by failing to notify Petitioner that she may need to undergo a medical examination before restoration.

to plead that Respondent provided insufficient notice to Petitioner under the FMLA. The Third Circuit also affirmed the district court's grant of summary judgment on Petitioner's ADA claim because: (1) Petitioner was not disabled[3] under the law; (2) Respondent delayed Petitioner's restoration for legitimate non-discriminatory reasons (because she would not submit to a medical examination), and not because of a disability; and (3) Petitioner failed to allow Respondent to determine how to accommodate her condition.

REASONS FOR DENYING THE PETITION

I. Neither The Record Nor The Third Circuit's Ruling Below Raise The Questions Presented By The Petition.

The case below, as it relates to Petitioner's claims, involves only one basic question: whether the FMLA prohibits an employer from conditioning an employee's restoration on a medical examination, which comports with the employer's past practice under the CBA, and is proper under the ADA because the employee requested additional accommodations.

Petitioner's "questions presented" are not presented by the record or opinion below. Instead, they are an opaque attempt to garner the Court's undeserved attention. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984) ("we do not ordinarily consider questions not specifically passed upon by the lower court").

---

3. Respondent also did not regard Petitioner as disabled under the ADA.

Petitioner's first "question presented" of whether the FMLA requires reinstatement of an employee on medical leave, who requires the same accommodation she had pre-leave, is absent from the record and opinion below. (Petition, page i). In stark contrast, Petitioner required additional accommodations to be able to return safely from her FMLA leave, *not* the same pre-leave workplace accommodations that caused her to miss over two months of work.

Petitioner's second "question presented" also is absent from the opinion below: whether the FMLA permits an employer to delay restoration until a medical examination because of the employer's past practice. (Petition, page i). The Third Circuit did not even mention Respondent's "past practice" with the union in affirming the district court.

Petitioner's third "question presented" of whether the FMLA allows an employer to condition restoration on a medical examination without first giving written notice to the employee, is also absent from the record and opinion below. (Petition, page i). Petitioner failed to plead in her Complaint (and two subsequent amendments), that the Respondent provided her deficient notice under the FMLA. Thus, Petitioner waived this claim.

Petitioner's fourth "question presented" of whether the ADA requires employers to accommodate "regarded as" disabled employees is also not presented by the record and opinion below. (Petition, page i). Neither the district court nor the Third Circuit discussed whether the ADA requires employers to accommodate "regarded as" disabled employees.

II. The Third Circuit's Ruling Does Not Conflict With A Decision By This Court Or Any Court Of Appeals.

There is no conflict between the circuits on the questions presented by Petitioner. Contrary to Petitioner's allegations, the Eighth Circuit's decision in *Duty v. Norton-Alcoa Proppants*, 293 F.3d 481 (8th Cir. 2002) does not conflict with the Third Circuit's decision below. The Third Circuit concluded that an employee returning from FMLA leave is not entitled to accommodations. In *Duty*, the Eighth Circuit did not even address this issue. Instead, the Eighth Circuit concluded that Duty presented enough evidence that she could perform the essential functions of her position.

The other cases cited by Petitioner also present no conflict among the circuits. Petitioner cites mostly district court cases, where the circuit court is silent on the questions presented. *See Albert v. Runyon*, 6 F. Supp. 2d 57 (D. Mass. 1998); *Routes v. Henderson*, 58 F. Supp. 2d 959 (S.D. In. 1999); *Mathews v. Fairview Health Servs.*, 2003 U.S. Dist. LEXIS 5901 (D. Minn. 2003); *Underhill v. Willamina Lumber Co.*, 1999 U.S. Dist. LEXIS 9722 (D. Or. 1999). Further, these district court cases do not present a conflict with the Third Circuit's decision below because the *Albert*, *Routes*, *Mathews* and *Underhill* courts did not consider whether an employee is entitled to immediate restoration when additional accommodations are required for a safe return. These district courts also did not consider the implications of a past practice, as did the district court below.

In *Albert*, the court even noted that a fitness-for-duty examination under the ADA is contemplated by the FMLA:

> Holding that an employer needs some reason beyond an employee's having taken FMLA leave

> to justify ordering a fitness-for-duty examination does not imply that there is never adequate reason to require a returning employee to undergo such an examination. Indeed, the FMLA contemplates that this may happen. 29 C.F.R. § 825.310(b) ("Requirements under the [ADA] that any return-to-work physical be job-related and consistent with business necessity apply.")

Albert, 6 F. Supp at 69.

Petitioner also relies upon this Court's decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002). Petitioner's reliance is misplaced. In *Ragsdale* this Court considered the validity of a regulation promulgated by the Secretary of Labor, not the questions presented here — medical examinations under the ADA consistent with past practice.

The only other cases relied upon by Petitioner are *Buskirk v. Apollo Metals*, 307 F.3d 160 (3d Cir. 2002), and *Wilson v. Lemington Home for the Aged*, 159 F. Supp.2d 186 (W.D. Pa. 2001). These cases do not present a conflict with the Third Circuit's decision below. *Buskirk* clarified the elements of a "regarded as" claim under the ADA, which is not an issue discussed by the Third Circuit's decision below. *Wilson* is unhelpful to Petitioner because the court did not consider whether an employee's request for additional accommodations can delay restoration under the FMLA. Any difference between the Third Circuit's decision below and one of its previous decisions, or a decision by a district court in the Third Circuit is best left to the Third Circuit to resolve.

Because Petitioner fails to present a conflict among the circuits on the question presented, the petition for writ of certiorari should be denied.

III. This Case Does Not Have Any Far Reaching Implications.

This case turns on its own unique facts, and has no far reaching implications. The question presented arises only in the situation where an employee, while on FMLA leave, requires additional accommodations under the ADA, but refuses to undergo a medical examination, which is consistent with past practice, to ensure her safe return. This set of circumstances is so rare that no other case has dealt with it. Any ruling by this Court should be limited to the bizarre set of facts below.

Petitioner's own words reflect the oddity of her claim:

> A. I was not required to get an IME to return to work.
>
> Q. Okay. Let me get this straight, so it's clear. What you're saying is the Township should have said Mrs. Conroy, come back into work, and in the first minute of you coming to work having restored you to your job, said to you, okay, now as your first duty being back in your job, you have to go see a doctor —
>
> A. I would be required —

Q. — is that what you are saying?

A. — under the contract to do so.

Q. Okay. And that's what you wanted to happen?

A. I didn't think it would be necessary, but I went by what was rightfully the correct way to do it.

Q. And that is what your lawsuit is all about.

A. Yes, you had to bring me back and you chose not to.

Q. And if the Respondent had brought you back and as you showed up —

A. I would have performed another — I wasn't due to retire until 2003, I'd still be there.

Q. Would you have undergone an IME?

A. If I was required to I would have.

(NT, 7/24/02 at 94-5).

Because the facts of this case are not generally applicable, the Court should deny the petition for writ of certiorari.

IV. The Third Circuit Was Correct In Affirming The District Court.

The Third Circuit properly affirmed[4] the district court. Judgment as a matter of law on Petitioner's FMLA claims was proper. Petitioner was not entitled to immediate restoration under the FMLA; she required additional accommodations to ensure a safe return. The only way for the Respondent to determine what accommodations, if any, were necessary was to require Petitioner to undergo a medical examination. Respondent's decision to condition Petitioner's restoration on her attendance at a medical examination does not state a claim under the FMLA.

The Secretary of Labor has promulgated regulations that support the Third Circuit's decision below. The regulations clarify that an employee has no right to restoration when she requires an accommodation. 29 C.F.R. § 825.214(b) ("If the employee is unable to perform an essential function of the position because of physical or mental condition, including the continuation of a serious health condition, the employee has no right to restoration to another position under the FMLA"). As noted by the Third Circuit, "without adequately addressing the air current problem (which required Petitioner to submit to an IME), Petitioner could not continue to perform the essential functions of her job." (Pet. App. at 5a).

---

4. Third Circuit properly affirmed the District Court's grant of summary judgment to Respondent. The undisputed evidence established that Petitioner was not disabled, and Petitioner failed to adduce any evidence that Respondent's legitimate non-discriminatory reason for not reinstating her (the need for a medical examination) was pretext.

Similarly, the Secretary of Labor, in harmony with the Third Circuit's decision, has recognized that return-to-work physicals under the ADA may be required of an employee returning from FMLA leave. C.F.R. § 825.310(b) ("[R]equirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job related and consistent with business necessity apply.") In fact, the Legislature did not intend the FMLA to modify the ADA. 29 C.F.R. § 825.702(a) ("FMLA's legislative history explains that FMLA is 'not intended to modify or affect the Rehabilitation Act of 1973, as amended, the regulations concerning employment which have been promulgated pursuant to that statute, or the Americans with Disabilities Act of 1990.")

If Petitioner were to have her way, the FMLA would prohibit medical examinations under the ADA for employees returning from FMLA leave. Such a reading of the FMLA is unreasonable.

Because the Third Circuit was correct in affirming the district court, this Court should deny the petition for writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOSEPH J. CENTENO
OBERMAYER REBMANN MAXWELL
& HIPPEL LLP
One Penn Center
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103
(215) 665-3000

Attorneys for Respondent
Township of Lower Merion